No. 17-571

IN THE
Supreme Court of the United States

FOURTH ESTATE PUBLIC BENEFIT CORPORATION,
Petitioner,

v.

WALL-STREET.COM, LLC,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE*
THE COPYRIGHT ALLIANCE
IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTERESTS OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. The Better Reading Of The Statutory Language Favors The Application Rule. .. 7

II. The Certificate Rule Harms Authors And Other Copyright Owners. 10

III. The Application Rule Gives Congress' Objectives Effect. 19

IV. The Certificate Rule Is Not Necessary To Satisfy The Objective Of Allowing The Register Of Copyrights To Advise Courts In Infringement Actions. 23

V. The Policies Underlying The Copyright Act Favor The Application Rule. 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

A & M Records Inc. v. Napster, Inc.,
239 F.3d 1004 (9th Cir. 2001).....11

Anton Sport, Inc. v. Monkey Boy Graphix Inc.,
No. CV 08-377-PHX-ROS, 2008 WL 11339089 (D. Ariz. July 22, 2008).....17

Application Sci. & Tech., LLC v. Statmon Tech. Co.,
No. 05 C 6864, 2006 U.S. Dist. LEXIS 35885 (N.D. Ill. Apr. 21, 2006).....17

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No. 3:09CV283-HEH, 2009 WL 1675707 (E.D. Va. June 15, 2009).....11

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No. 5:15-cv-00771-EJD, 2018 WL 2183236 (N.D. Cal. May 11, 2018).....18

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283 F.3d 798 (6th Cir. 2002).....20

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606 F.3d 612 (9th Cir. 2010).....6, 13, 14, 24

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(continued)

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36 F.3d 1147 (1st Cir. 1994) 20

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537 U.S. 186 (2003) 27

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No. 08-CV-0764-MJR, 2008 WL 4853634
(S.D. Ill. Nov. 5, 2008) 12

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138 S. Ct. 2707 (2018) 23

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856 F.3d 1338 (11th Cir. 2017) 22

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33 F. Supp. 2d 1304 (D. Kan. 1999) 13

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565 U.S. 302 (2012) 9, 27

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81 F. Supp. 2d 70 (D.D.C. 2000).....10

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416 F.3d 1195 (10th Cir. 2005).....11

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642 F.3d 87 (1st Cir. 2011).....15

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545 U.S. 913 (2005).....11

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857 F. Supp. 679 (N.D. Cal. 1994).....12

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542 F.3d 859 (11th Cir. 2008).....17, 18

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17 U.S.C.
- § 102 21
- § 408 21
- § 408(f)(2) 12
- § 408(f)(3) 13
- § 410 24
- § 410(b) 22
- § 410(c) 6, 15
- § 411(a) ..... *passim*
- § 411(c) 8
- § 412 ..... 6, 15, 22
- § 502 11
- § 504 15
- § 507 13
- § 508 ..... 6, 25
- § 512(g)(2) 19

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- § 201.3(c) 13
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INTERESTS OF *AMICUS CURIAE*[1]

The Copyright Alliance is a nonprofit, nonpartisan, 501(c)(4) membership organization dedicated to serving as the unified voice of the copyright community. It represents the interests of hundreds of thousands of individuals and organizations across the spectrum of copyright disciplines, including authors, photographers, performers, artists, software developers, musicians, journalists, directors, songwriters, game designers and many other individual creators. The Copyright Alliance also represents the interests of book publishers, motion picture studios, software companies, music publishers, sound recording companies, sports leagues, broadcasters, guilds, unions, newspaper and magazine publishers, and many more organizations.

The individual creators and producing organizations represented by the Copyright Alliance rely on copyright law to protect their originality, efforts, and investments in the creation and distribution of copyrighted works to the public for educational, commercial and entertainment purposes. Accordingly, Copyright Alliance members are frequently plaintiffs in copyright infringement

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[1] No party or counsel for any party authored any part of this brief or made a monetary contribution intended to fund the preparation and submission of this brief. All parties consent to *Amicus* filing this brief.

cases and other cases involving copyrighted works, seeking to protect their ownership rights and investments. However, Copyright Alliance members are also frequently defendants in such cases. For that reason, they bring a balanced and experienced perspective to the issue presented.

Amicus has a particular interest in the resolution of the question presented in light of the lengthy pendency times for registration applications, which results from resource constraints and the lack of modernization of the Copyright Office and its information technology systems.[2] The Copyright Alliance has testified before multiple Congressional committees seeking to support the Copyright Office's efforts to modernize, increase its funding, and separate its own governance from that of the Library of Congress, whose interests and priorities frequently

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[2] The Register acts on applications submitted online in cases where no additional correspondence is required between the Copyright Office and the applicants (approximately 66% of applications) within three to eleven months, seven months on average; paper applications without correspondence (approximately 3% of applications) take two to sixteen months, nine on average; web applications with correspondence (approximately 30% of applications) take three to sixteen months, nine on average; and paper applications with correspondence (approximately 2% of applications) take four to twenty-eight months, sixteen months on average. U.S. Copyright Office, *Registration Processing Times*, https://www.copyright.gov/registration/docs/processing-times-faqs.pdf.

do not align with those of the Copyright Office.[3] The Copyright Alliance applauds this Court's grant of *certiorari* here to resolve the split in the Courts of Appeals regarding whether 17 U.S.C. § 411(a) shuts the courthouse door on any plaintiff whose registration application has not yet been acted upon by the Register. An application of the statute consistent with its language and Congress' intent favors the Application Rule (*i.e.*, allowing a plaintiff

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[3] *E.g.*, Copyright Alliance, *US Copyright Office Modernization*, https://copyrightalliance.org/policy/position-papers/copyright-office-modernization/ (last visited Aug. 24, 2018); Copyright Alliance, *Statement of Keith Kupferschmid before the House Comm. on Appropriations Subcomm. on Legislative Branch* (Apr. 17, 2018), https://copyrightalliance.org/wp-content/uploads/2018/04/House-Leg-Branch-Appropration-Testimony.pdf; Copyright Alliance, *Statement of Keith Kupferschmid before the House Comm. on Appropriations Subcomm. on Legislative Branch* (May 3, 2017), https://copyrightalliance.org/wp-content/uploads/2017/05/House-Leg-Branch-Approp-hrg-testimony-May-20171.pdf; Copyright Alliance, *Statement of Keith Kupferschmid before the House Admin. Comm. on Improving Customer Service for the Copyright Community* (Dec. 2, 2015), https://copyrightalliance.org/wp-content/uploads/2016/08/copyright_alliance_testimony_on_usco_it_systems_hearing_in_house_admin_com_dec_2_2015_0.pdf; Copyright Alliance, *Letter from Keith Kupferschmid on U.S. Copyright Office Modernization Efforts and Appropriations* (Apr. 15, 2016), https://copyrightalliance.org/wp-content/uploads/2016/10/041516-Copyright-Alliance-Letter-USCO-Appropriations.pdf. The Copyright Alliance also supported the Copyright Office for the Digital Economy Act and the Register of Copyrights Selection and Accountability Act of 2017.

to file suit once a complete application is submitted). Moreover, the Application Rule gives effect to the purposes of the Copyright Act, including by providing copyright owners with the ability to enforce their rights in timely and meaningful ways while maintaining incentives to register works and preserving the benefit to the lower courts of the Register's input in cases where she determines she should intervene.

SUMMARY OF ARGUMENT

The Application Rule (i) is the better application of the statutory text and history; (ii) avoids the significant harms that would be worked by the Certificate Rule (*i.e.*, requiring that Office action be completed prior to the filing of a complaint); (iii) preserves Congress' intent to incentivize submissions of application information and deposit copies; (iv) has no impact on the courts' access to advice from the Register of Copyrights; and (v) furthers Congress' objective of providing effective, enforceable, exclusive rights to copyright owners, so that they can pursue immediate relief for infringements.

In 1981, the Copyright Office took five to six weeks to issue or deny a registration certificate. U.S. GENERAL ACCOUNTING OFFICE, GAO/AFMD-83-113, IMPROVING PRODUCTIVITY IN COPYRIGHT REGISTRATION 1 (1982). And its leadership at that time acknowledged that even that processing period

was too long – something to strive to reduce. *Id.* Now, applications remain pending for many months, not weeks. U.S. Copyright Office, *Registration Processing Times*, https://www.copyright.gov/registration/docs/processing-times-faqs.pdf.

The current time for the Copyright Office to process an application (*i.e.*, seven months for an average online application and nine months for an average paper application) is far too extended for a copyright owner to wait for a certificate before filing a lawsuit. An author, especially a small business or individual creator, should not be forced to pay a steep administrative tax – which is approximately twenty times the normal fee, 37 C.F.R. § 201.3(d), and must be paid in addition to that fee – to expedite her application before filing suit against infringers. Even waiting two weeks for the Copyright Office to process an expedited application could result in massive infringement occurring before injunctive relief would become available. Fast-paced infringement in the digital environment often causes significant harm in very little time. Once she has submitted a complete registration application, bureaucratic processes should not stymie an author's efforts to protect her rights. This is especially true given that it is only U.S. authors, not foreign authors, who are shut out of court by the Certificate Rule. 17 U.S.C. § 411(a).

Congress' policy objectives of incentivizing the filing of registration applications – to populate the public catalogue of information concerning copyright

ownership and to provide deposit copies to the Library of Congress – are met by requiring the submission of a complete registration application prior to the filing of an infringement lawsuit. *Cosmetic Ideas, Inc. v. IAC/Interactive Corp.*, 606 F.3d 612, 620 (9th Cir. 2010). Congress intended other provisions of the Copyright Act to incentivize copyright owners to submit applications soon after the creation or publication of their works by, for example, conditioning the availability of statutory damages and attorney's fees on applying for registration prior to initiation of infringement and providing *prima facie* validity to the facts stated in a registration certificate with an effective date of five years from publication. *See* 17 U.S.C. §§ 410(c), 412. Those provisions remain in force under the Application Rule.

Moreover, for multiple reasons, the Application Rule preserves the Register's ability to advise the courts during infringement actions. For example, the Copyright Office, which intervenes in cases very infrequently, is notified by clerks of courts when plaintiffs file infringement lawsuits. 17 U.S.C. § 508. Thus, the Register, if she is inclined to have an opportunity to weigh in early during litigation, could simply expedite review of every application that is at issue in pending litigation. The cost to the Copyright Office for expediting applications is virtually non-

existent.[4] Or, if the Register chooses not to voluntarily expedite applications, courts could stay cases or rely on the doctrine of primary jurisdiction to create time to request advice from the Register.

The negligible benefits, if any, of the Certificate Rule pale in comparison to the countervailing harms it would cause. The underlying policies of the Copyright Act strongly favor adoption of the Application Rule.

ARGUMENT

I. The Better Reading Of The Statutory Language Favors The Application Rule.

As more fully articulated in the brief of Petitioner, the better reading of the statutory text favors the Application Rule because the applicable provision focuses on determining whether the applicant has taken all steps available to her to obtain a registration. Section 411(a) states: "[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim ***has been made*** in accordance with this title." Of course, the use of the passive voice in the provision begs the question of ***who*** must have made the registration. While section 411(a) does not itself expressly answer this question,

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[4] *See* note 12, *infra* regarding the high fees applicants must pay associated with expedited registration.

other provisions within the Copyright Act – indeed, within the same section – refer to ***copyright owners*** making registrations. *E.g.*, 17 U.S.C. § 411(c) (emphasis added) (permitting an action for infringement of the copyright in "a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission" if, among other requirements, "***the copyright owner . . . makes registration*** for the work within three months after its first transmission.").

This reading is supported by the legislative history, which repeatedly references copyright owners making registrations. *E.g.*, H.R. REP. NO. 94-1476, at 157 (1976) ("Under the bill, as under the law now in effect, ***a copyright owner who has not registered his claim*** can have a valid cause of action against someone who has infringed his copyright, but he cannot enforce his right in the courts until ***he has made*** registration."); S. REP. NO. 94-473, at 139 (1975) (same); *Id.* at 135 ("[R]egistration of a claim of copyright in any work ... ***can be made voluntarily by 'the owner of copyright*** or of any exclusive right in the work' at any time during the copyright term."); *Supplementary Register's Report on the General Revision of the U.S. Copyright Law*, H.R. Comm. Print, 89th Cong., 1st Sess. 124 (1965), in 9 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, App. 15-153 ("***[H]e must register his***

claim before he can enforce his rights in the courts.").[5]

Opinions from this Court have similarly referred to copyright owners registering their works. *E.g.*, *Golan v. Holder*, 565 U.S. 302, 314 n.11 (2012) ("The Copyright Act retains . . . incentives for ***authors to register*** their works . . . ."); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 171 (2010) (Ginsburg, concurring) (section 411(a) "***instructs authors to register their copyrights*** before commencing suit for infringement").

Given all of the foregoing, the better reading of the phrase "has been made" is "has been made by the applicant." After paying the fee, filing a proper registration form, and providing a deposit copy to the Copyright Office, there are no further actions an applicant can take to obtain a registration. Therefore, under the best application of the statute, the registration requirement is satisfied by filing a complete application. Moreover, as discussed further below, the Application Rule is consistent with Congress' intent and policy objectives relating to the

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[5] The fact that Congress was acting to overturn the Second Circuit's *Vacheron & Constantin-Le Coutre Watches, Inc. v. Bernus Watch Co.*, 260 F.2d 637 (2d Cir. 1958), decision, which prevented plaintiffs from suing infringers after the Register's denial of an application, is further evidence that Congress did not want the actions of the Register to determine when, and whether, a plaintiff had access to the courts. *See* H.R. REP. NO. 94-1476, at 157.

practical impact the Certificate Rule would have on creators and copyright owners.

II. The Certificate Rule Harms Authors And Other Copyright Owners.

Courts on both sides of the divide have acknowledged that the Application Rule generates better policy outcomes. *See, e.g., Int'l Kitchen Exhaust Cleaning Ass'n. v. Power Washers of N. Am.*, 81 F. Supp. 2d 70, 72 (D.D.C. 2000) (following Application Rule: "To best effectuate the interests of justice and promote judicial economy, the court endorses the position that a plaintiff may sue once the Copyright Office receives the plaintiff's application, work, and filing fee."); *Loree Rodkin Mgmt. Corp. v. Ross-Simons, Inc.*, 315 F. Supp. 2d 1053, 1056-57 (C.D. Cal. 2004) (following Certificate Rule but calling it an "inefficient and peculiar result") (quoting *Ryan v. Carl Corp.*, No. C 97-3873 FMS, 1998 WL 320817, at *3 (N.D. Cal. June 15, 1998)).

Leading copyright commentators agree that the Application Rule is the better reading of the statute. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[B][3][b][ii] (Matthew Bender 2018) ("Given that the claimant has submitted an application that has yet to be acted upon at that juncture has done all that she can do, and will ultimately be allowed to proceed regardless of how the Copyright Office treats her application, it makes little sense to create a period of 'legal limbo' in which suit

is barred."); I PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 3.15 (Aspen 2018) ("The application approach is the better rule."). In part, this conclusion stems from the needless and harmful impacts felt by copyright owners under the Certificate Rule. These harms include:

1. A temporary restraining order or preliminary injunction, *see* 17 U.S.C. § 502, would likely be unavailable to an author while she awaited action from the Register, which would be a problem despite the availability of expedited application processing. *See La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1204 (10th Cir. 2005), *abrogated in part by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) ("Every remedy outlined in Title 17, including injunctions, is conditioned upon a copyright owner having registered the copyright."); *Balzer & Assocs., Inc. v. Union Bank & Tr. Co.*, No 3:09CV283-HEH, 2009 WL 1675707, at *4-5 (E.D. Va. June 15, 2009) (dismissing request for injunctive relief due to lack of registration).[6]

Millions of infringing copies or performances of a work can take place in days, or even minutes. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 923 (2005); *A & M Records, Inc. v.*

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[6] *La Resolana Architects* and *Balzer*, to the extent they treated section 411(a) as a jurisdictional requirement, are inconsistent with this Court's later opinion in *Muchnick*.

Napster, Inc., 239 F.3d 1004, 1019 (9th Cir. 2001). Accordingly, even if a copyright owner makes registration of her work on the first day of publication, massive amounts of infringement can occur before she can obtain a registration certificate.

This problem is of unique concern in cases of pre-release piracy, where a work has not yet hit the legitimate market but is already being pirated at a rapid pace. *See, e.g., Sega Enters. Ltd. v. MAPHIA*, 857 F. Supp. 679, 689 (N.D. Cal. 1994) (injunction issued against, *inter alia*, online distribution of unreleased video games); *Lions Gate Films, Inc. v. Does*, No. 2:14-cv-06033-MMM, 2014 WL 3895240, at *2, 5-7 (C.D. Cal. Aug. 8, 2014) (injunction issued against online distribution of millions of copies of the unreleased movie "Expendables 3"); *Epic Games, Inc. v. Altmeyer*, No. 08-CV-0764-MJR, 2008 WL 4853634, at *6 (S.D. Ill. Nov. 5, 2008) (discussing the "immediate irreparable harm" caused by Defendant selling advanced copies of Plaintiff's copyrighted video game prior to the release of the game); *see also Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (involving infringement of biography of President Gerald Ford prior to its publication).

While some categories of copyrighted works are eligible for pre-registration, not all categories of works are. *See* 37 C.F.R. § 202.16 (covering, for example, only "advertising or marketing photographs," and not other photographs); 17 U.S.C. § 408(f)(2) (instructing Register to issue regulations

to define "class[es] of works that . . . had a history of infringement prior to authorized commercial distribution"). And, even if all works could be pre-registered, there is no purpose in slamming the courthouse door on authors who elect not to register prior to publication, which results in them having to file two applications, rather than one. *See* 17 U.S.C. § 408(f)(3) (requiring second registration application to be submitted "[n]ot later than 3 months after the first publication of a work preregistered . . ."); *see also* 37 C.F.R. § 201.3(c) (fee for pre-registration application is $140, four times the standard fee).

2. A plaintiff could lose her chance to sue entirely if the statute of limitations, 17 U.S.C. § 507, were to expire before the Register took action on an application. *Cosmetic Ideas*, 606 F.3d at 620-21. At least one court, *Gerig v. Krause Publ'ns, Inc.*, 33 F. Supp. 2d 1304, 1306 (D. Kan. 1999), has concluded that a case may be back-dated to the effective date of a registration for statute of limitations purposes, even if the case could not be filed until the limitations period technically ended. But there is no guarantee that such an equitable approach would become widespread.

In 1957, when Congress debated the statute of limitations period to include in a revision of the 1909 Copyright Act, Congress was considering a number of different lengths, ranging from one year to eight years. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 (2014) (citing H.R. REP. NO. 2419, at 2

(1956)); *see generally* S. REP. NO. 85-1014 (1957). It is significant that a two-year statute of limitations was considered, and that Congress specifically chose three years to provide injured parties with enough time to commence actions. This implies that Congress did not believe that a two-year period was adequate.

In 1976, Congress decided to retain the three-year period because the 1957 legislation "represent[ed] a reconciliation of views." S. REP. NO. 94-473, at 146. Yet, in practice, the three-year statute of limitations, combined with adherence to the Certificate Rule, would often create a *de facto* two-year statute of limitations because applications often remain pending at the Copyright Office for a year or more.[7] As the Ninth Circuit stated, "[t]his result does not square well with § 410(d)'s mandate that an application's effective registration date should be the day that a completed application is received." *Cosmetic Ideas*, 606 F.3d at 620; *see also* H.R. REP. NO. 94-1476, at 157 (noting that section 410(d) was designed to "take[] account of the inevitable timelag between receipt of the application and other material and the issuance of the certificate . . . .").

3. Plaintiffs could lose access to evidence while they lack opportunity to pursue discovery. Witnesses could die; documents could be deleted or

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[7] *See* note 2, *supra*.

destroyed; and memories could fade while a plaintiff awaited action by the Register.

4. Plaintiffs who have not submitted registration applications until the moment arrives to file lawsuits would frequently, although not always, already be precluded from seeking statutory damages and attorneys' fees, and, in some instances, would not receive any evidentiary benefit from the registration certificate. *See* 17 U.S.C. § 410(c) (denying *prima facie* weight to registrations not applied for within five years of publication); 17 U.S.C. § 412 (limiting availability of remedies where infringement began prior to the effective date of a registration certificate for unpublished works or prior to the effective date of a registration certificate for published works if the effective date is not within three months of publication). Given the cost of litigation, including the expense of proving actual damages and ill-gotten profits, 17 U.S.C. § 504, and that attorneys' fees are available to defendants regardless of the plaintiff's registration status of a work, *Latin American Music Co. v. ASCAP*, 642 F.3d 87, 90 (1st Cir. 2011), such plaintiffs are already at a disadvantage. Forcing them to pay an expedited fee or to wait months to sue makes matters even worse and could discourage the filing of meritorious claims, especially for individual creators of multiple, infringed works where the expedited registration fees can quickly overwhelm any possible economic returns in litigation.

As the Copyright Office itself has explained, such challenges have a big impact on individual authors and small businesses.[8]

> [W]hile a copyright owner may want to stop an infringement that has caused a relatively small amount of economic damage, that owner may be dissuaded from filing a lawsuit because the prospect of a modest recovery may not justify the potentially large expense of litigation. While the Act offers the possibility of statutory damages and attorney's fees, these benefits are not available in all cases and parties may not recover them until after the copyright owner has engaged in a long court battle that requires payment of significant up-front costs.[9]

U.S. Copyright Office, *Remedies for Copyright Small Claims*, https://www.copyright.gov/docs/smallclaims/.

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[8] Owners of large portfolios of copyrighted works would also be harmed by the Certificate Rule, given the difficulties and costs associated with registering each work in such portfolios.

[9] The Copyright Alliance supports the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2017, which would create of a small claims board to be housed at the Copyright Office to help to alleviate some of these problems.

5. Authors who are U.S. nationals would be at a distinct disadvantage to authors who are foreign nationals, and who need not register their copyrighted works prior to filing suit in U.S. courts. *See* 17 U.S.C. § 411(a) (limiting registration requirement to "United States work[s]"); 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[B][1][b][ii]. This peculiar scenario, which resulted from Congress' approach to implementing the Berne Convention on the Protection of Literary and Artistic Works' prohibition on statutory formalities in 1989, *id.* at § 7.16[B][6][c], is less perplexing when the Application Rule allows U.S. authors into court after submitting completed applications.

6. Would-be plaintiffs would potentially be at a disadvantage to potential defendants, who, in some courts, could file for declaratory relief without regard to a work's registration status. *Compare Application Sci. & Tech., LLC v. Statmon Tech. Co.*, No. 05 C 6864, 2006 U.S. Dist. LEXIS 35885, at *2 (N.D. Ill. Apr. 21, 2006) (holding no registration required to seek declaration of non-infringement), and *Anton Sport, Inc. v. Monkey Boy Graphix Inc.*, No. CV 08-377-PHX-ROS, 2008 WL 11339089, at *1–2 (D. Ariz. July 22, 2008) (same), *with Stuart Weitzman, LLC v. Microcomputer Res., Inc.*, 542 F.3d 859, 863 (11th Cir. 2008), *abrogated in part by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (requiring

registration).[10] Potential defendants would thereby gain a "leg up" in selection of the litigation's forum and the procedural posture of the case, in which the defendant and potential counterclaimant could be barred from filing compulsory counterclaims for months (potentially resulting in waiver of those claims). *See Touchpoint Commc'ns., LLC v. Dentalfone, LLC*, No. 3:15-cv-05240-JRC, 2016 WL 524260, at *4 (W.D. Wash. Feb. 10, 2016) (referring to an infringement claim as a compulsory counterclaim to a declaratory judgment complaint seeking a declaration of non-infringement); *Cabell v. Zorro Prods. Inc.*, No. 5:15-cv-00771-EJD, 2018 WL 2183236, at *17 n. 12 (N.D. Cal. May 11, 2018) ("The Court also notes that, because Defendants did not counterclaim for infringement, it may be that they have forever abandoned their ability to bring these claims."); *Scepter, Inc. v. Metal Bulletin Ltd.*, 165 F. Supp. 3d 680, 687 (M.D. Tenn. 2016) (citing *Meathe v. Ret*, 547 Fed. Appx. 683, 687 (6th Cir. 2013), which states that "a claim for infringement is a compulsory counterclaim in a suit for declaratory judgment of non-infringement.") (internal quotations omitted).

7. If a copyright owner informs an online service provider that user-uploaded content is infringing and the user disputes that assertion, the service provider may elect not to disable access to the

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[10] *Stuart Weitzman* is, in part, inconsistent with this Court's opinion in *Muchnick*, which held that section 411(a) is not jurisdictional.

content if the copyright owner does not file a complaint against the infringer within fourteen business days. 17 U.S.C. § 512(g)(2). Under the Certificate Rule, the copyright owner might not be able to file a complaint within fourteen days, depending on whether the Register takes action on a pending application.

III. The Application Rule Gives Congress' Objectives Effect.

Congress adopted the requirement, embodied in section 411(a), that authors of U.S. works register those works before filing infringement actions, not to benefit defendants (*i.e.*, potential infringers), but instead to serve "broader public and governmental interests[.]" Brief for the United States as *Amicus Curiae* Supporting Vacatur and Remand, at 11, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (No. 08-103). Each of these public and governmental interests is given full effect by the Application Rule.

1. One purpose of section 411(a) is to incentivize depositing copies of works for the collection of the Library of Congress. BRUCE KELLER & JEFFREY CUNARD, COPYRIGHT LAW: A PRACTITIONER'S GUIDE § 5:3 (Keith Voelker, 2d ed. 2017) (citing legislative history). The estimated value of deposits received in 2017 was $40,821,089. U.S. Copyright Office, *Annual Report* 19 (2017) ("2017 Annual Report").

These deposits not only enable the Library to serve as the nation's leading archive of published works, but also provide valuable evidence in litigation. *See, e.g.*, *Williams v. Gaye*, 885 F.3d 1150, 1169 (9th Cir. 2018), *modified by* 895 F.3d 1106 (9th Cir. 2018) (discussing centrality of deposit copy in case involving alleged infringement of musical composition); *Coles v Wonder*, 283 F.3d 798, 802 (6th Cir. 2002) (where plaintiff's deposit copy was an attempt at recreating a work he allegedly created years earlier, he could not prove defendant could have accessed the work prior to creating the allegedly infringing work); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1161–62 (1st Cir. 1994), *abrogated in part by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (citing legislative history for the assertion that the "key purpose" of the deposit requirement "is to prevent confusion about which work the author is attempting to register"); *Torres-Negron v. J & N Records, LLC*, 504 F.3d 151, 163–64 (1st Cir. 2007) (concluding that a reconstruction, created without direct access to the original, "cannot constitute a 'copy' sufficient to satisfy the deposit copy requirement", and "[s]ubmission of a reconstruction with a copyright registration application results in an incomplete application"); *Tavory v. NTP, Inc.*, 495 F. Supp. 2d 531, 536 (E.D. Va. 2007), *affirmed by* 297 F. App'x 976 (Fed. Cir. 2008) (finding that the deposit requirement serves a "gatekeeping" and "evidentiary" function and that the "copies that are submitted . . . with an application for registration then become part

of a record by which claims of infringement are tested").

This purpose is fully vindicated by the Application Rule. So long as plaintiffs continue to file registration applications prior to filing lawsuits, as they must under the Application Rule, the Library will continue to receive deposits for its collections and litigants and courts will continue to have access to deposit copies during litigation. Indeed, the Certificate Rule could actually decrease the number of applications filed and deposits submitted because copyright owners might elect not to enforce their rights at all if they cannot pursue enforcement actions quickly and in a cost-effective manner.

2. A second purpose of section 411(a) is to incentivize copyright registration, which is permissive, not mandatory, under the Copyright Act. 17 U.S.C. §§ 102, 408. The availability of copyright registrations via their inclusion in the Copyright Office's online and hard-copy files, increases public access to information concerning copyrighted works. BRUCE KELLER & JEFFREY CUNARD, COPYRIGHT LAW: A PRACTITIONER'S GUIDE § 5:3 (citing legislative history).

The Application Rule provides a strong incentive to provide ownership information in registration applications by requiring their submission prior to a plaintiff initiating a lawsuit. The Certificate Rule, on the other hand, could result

in a decrease in the number of applications filed, where the substantial delay in receiving a registration certificate renders enforcement a less effective or prohibitively expensive remedy.

3. Supporters of the Certificate Rule maintain that Sections 507(b) and 411(a), considered together, "reflect a statutory plan to encourage registration." *See Fourth Estate Pub. Benefit Corp. v. Wall-Street.com*, 856 F.3d 1338, 1342 (11th Cir. 2017) ("[A]n owner who files an application late in the statute of limitations period risks losing the right to enforce his copyright . . . . But this potential loss encourages an owner to register his copyright soon after he obtains the copyright and before infringement occurs."). However, other provisions in the copyright law, including increased available remedies and *prima facie* evidence for timely certificates, are more effective incentives to register early. *E.g.*, 17 U.S.C. §§ 410(b) (registration certificate credited as *prima facie* evidence if dated within five years of publication), 412 (advanced remedies available if registration made prior to commencement of infringement for unpublished works or within three months of publication for published works). These incentives apply in exactly the same manner, regardless of whether the Application Rule or the Certificate Rule applies, because they are based on when the application was filed, not when it was issued. Therefore, adopting the Certificate Rule would do nothing to further

encourage authors who are not otherwise already spurred by these stronger incentives to register.

IV. The Certificate Rule Is Not Necessary To Satisfy The Objective Of Allowing The Register Of Copyrights To Advise Courts In Infringement Actions.

The United States' *amicus* brief at the petition stage advocated that one objective of section 411(a) that is not satisfied by submission of a registration application and deposit is the timely provision to a court of the Register's conclusion regarding the registerability and/or copyrightability of a work by a claimant. Brief for the United States as *Amicus Curiae* Supporting Grant of *Certiorari*, at 12, 14-15, 21-22, *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com*, 138 S. Ct. 2707 (2018) (No. 17-571). However, there are multiple reasons why this objective does not justify adopting the Certificate Rule.

1. Courts may, when appropriate, stay cases and/or request the Register's opinions. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[b][3][b][vi] (discussing stays); BRUCE KELLER & JEFFREY CUNARD, COPYRIGHT LAW: A PRACTITIONER'S GUIDE § 5:3.1 (discussing doctrine of primary jurisdiction); *Syntek Semiconductor Co. v. Microchip Tech.*, 307 F.3d 775, 780 (9th Cir. 2002) ("Primary jurisdiction is not a doctrine that implicates the subject matter jurisdiction of the

federal courts. Rather, it is a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decision-making responsibility should be performed by the relevant agency rather than the courts.").

There may be few cases where courts elect this approach given that, even in cases where courts do have the benefit of knowing the Register's views, either because she has acted on an application or intervened in a case, courts always conduct their own assessment of the case. *See Cosmetic Ideas*, 606 F.3d at 621, n. 13 ("After the Register's determination, the courts are empowered to review any denial of a certificate, and approval by the Register gives an applicant only *prima facie* evidence of copyright, leaving the courts to make the ultimate determination in either instance.").[11] This approach makes sense given that the review process involved in assessing registration applications is not extensive. *See id.* ("The Register looks only to ensure that the material deposited is 'copyrightable subject matter' and that the legal and formal requirements of the Title have been met.").

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[11] Of course, where a registration certificate has an effective date within five years of first publication of a work, courts are obligated to treat it as *prima facie* evidence of any fact stated on the certificate. 17 U.S.C. § 410. The outcome of this appeal will not alter that fact.

Nevertheless, in cases involving close questions where the Register has not elected to intervene prior to taking action on an application, courts remain free to seek her advice.

2. Every plaintiff – not only plaintiffs required to do so by section 411(a) – must notify the Copyright Office when an infringement case is filed. 17 U.S.C. § 508; Form AO121, Report on the Filing or Determination of an Action or Appeal Regarding a Copyright, http://www.uscourts.gov/sites/default/files/ao121.pdf. These notices provide the Register with opportunities to move applications to the front of the line; to take action; and to decide whether to intervene.[12]

3. In 2017, fewer than 3,500 copyright infringement cases were filed. Trac Reports, Inc., *Fewer Copyright Infringement Lawsuits Filed* (2017), http://trac.syr.edu/tracreports/civil/483/. The Copyright Office rarely intervenes or receives requests to provide advice to courts.[13] It appears that

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[12] The Copyright Office already has a process to allow litigants to expedite the processing of their applications. While the Copyright Office charges a steep fee of $800 per work (37 C.F.R. § 201.3(d)) – which it intends soon to increase to $1,000 – the reported internal cost to the Copyright Office of expediting a registration is only $67. *See Copyright Office Fees: Notice of Proposed Rulemaking*, 83 Fed. Reg. 24,054, 24,054, 24,059 (May 24, 2018).

[13] Last year, the Copyright Office received only three requests from courts for advice on registration issues. 2017 Annual

the Copyright Office did not affirmatively intervene in ***any*** case in 2017. This fact, combined with the low percentage of registration denials, puts the circumstances in perspective.

In 2017, the Copyright Office received 539,662 registration applications, and only denied close to 18,000 (3% of the total; and, of these "denials" many are likely due to incomplete applications – improper fees, no deposit copies – rather than substantive legal issues). In 2016, the Copyright Office received 533,606 claims and denied only 12,656 claims. A much smaller number of the denied applications concerned works involved in infringement suits. Thus, even if the Register were to elect not to voluntarily move works involved in infringement suits to the front of the application line, it is unlikely very many of those applications would eventually be denied or involve an issue the Register would need to intervene to address.

4. Current application processing time is, on average, seven months for online claims and nine months for paper claims. U.S. Copyright Office, *Registration Processing Times*, https://www.copyright.gov/registration/docs/processing-times-faqs.pdf. Median federal court litigation takes

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Report at 8. *See also* U.S. Copyright Office, *Archive of Legal Filings*, https://www.copyright.gov/rulings-filings/411/; U.S. Copyright Office, *Archive of Amicus Briefs*, https://www.copyright.gov/rulings-filings/briefs/.

10.1 months for disposition, and the period of months to reach a trial is 26.3. *United States District Courts: National Judicial Caseload Profile*, http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0331.2018.pdf

In many cases, therefore, courts will have the benefit of the Copyright Office's views on a registration application prior to issuance of a judgment, even under the Application Rule. "[T]he pace of litigation entails that the Copyright Office will typically have granted or refused registration during its pendency." 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[B][1][a][i].

V. The Policies Underlying The Copyright Act Favor The Application Rule.

Enforceable, exclusive rights incentivize creativity and the dissemination of works. *Golan v. Holder*, 565 U.S. 302, 326 (2012); *Mazer v. Stein*, 347 U.S. 201, 219 (1954). They also enable recoupment of investments. *Eldred v. Ashcroft*, 537 U.S. 186, 207 (2003) (describing Congress' rationale for extending copyright terms).

Reality has proven the wisdom of these policy determinations. Industries driven by the production of copyrighted works greatly benefit the U.S. economy. Press Release, Office of the United States Trade Representative, USTR Releases 2018 Special 301 Report on Intellectual Property Rights (Apr.

2018) (statement of Robert Lighthizer: "The ideas and creativity of American entrepreneurs fuel economic growth and employ millions of hardworking Americans.").

Creators and innovators thus deserve, and require for creative and financial success, protection from free-riding. I PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 1.13 ("[T]he continual expansion of exclusive rights . . . reflects Congress' awareness of the need to bring new technological uses of copyrighted works under copyright control if the law is to continue to encourage investment in creative effort."); *id.* at § 1.13.2.3.

These policies require even stronger rights and more rapid enforcement actions in the digital age. *See* S. REP. NO. 105-190, at 8 (1998) ("Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy."); Statement of Marybeth Peters, The Register of Copyrights before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary, United States House of Representatives, 105th Congress, 1st Sess., Sept. 11, 1997, No Electronic Theft (NET) Act of 1997 (H.R. 2265) ("Copyright owners today lose substantial sums of money to piracy. The advent of digital technology has the potential to exacerbate greatly the impact of piracy,

as it allows users to make multiple perfect copies in an instant, without requiring a major investment in physical manufacturing and distribution facilities.").

As described *supra* in section II, the Application Rule vindicates this purpose by ensuring meaningful and timely access to judicial enforcement remedies. In contrast, the Certificate Rule creates a road block to rapid enforcement of exclusive rights, thereby undermining the very purposes of the statute of which section 411(a) is one part.

CONCLUSION

Amicus respectfully submits that the Court should reverse the Eleventh Circuit's affirmance of the trial court's dismissal.

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